Supreme Court, U.S.
FILED

971242 JAN 27 1998

OFFICE OF THE CLERK

No.___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNAMETAL, INC.,
Petitioner,

v.

COMMISSIONER OF REVENUE
FOR THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Petition for Writ of Certiorari To the Supreme Judicial Court of the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

William E. Halmkin
(Counsel of Record)
Arthur A. Hundhausen
Robert M. Finkel
Hutchins, Wheeler & Dittmar
A Professional Corporation
101 Federal Street
Boston, Massachusetts 02110

75 pp

QUESTIONS PRESENTED

1. Whether the Massachusetts Supreme Judicial Court properly followed this Court's interpretation of Public Law No. 86-272 (codified at 15 U.S.C. § 381 (1994)) as set forth in *Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992)?

2. Whether the Massachusetts Supreme Judicial Court violated the standards set forth by this Court in *Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992), by holding that activities designed "to ingratiate customers and to assist buyers in knowing what to order" and "generally, to increase sales" exceeded the protection of Public Law 86-272?

PARTIES

The petitioner is Kennametal, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania and headquartered in that Commonwealth. Kennametal, Inc. has no parent company. Kennametal has numerous subsididary corporations, however, only two are publicly traded: JLK Direct Distribution, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania, and Kennametal Hertel, AG, a corporation organized under the laws of the Federal Republic of Germany.

The petitioner was the appellant before the Appellate Tax Board of the Commonwealth of Massachusetts, and plaintiff/appellant before the Supreme Judicial Court of the Commonwealth of Massachusetts.

The respondent is the Commissioner of Revenue for the Commonwealth of Massachusetts.

The respondent was the appellee before the Appellate Tax Board of the Commonwealth of Massachusetts, and defendant/appellee before the Supreme Judicial Court of the Commonwealth of Massachusetts.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

INTRODUCTION 1
OPINIONS BELOW 2
JURISDICTION 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
FEDERAL STATUTES INVOLVED 3
STATEMENT OF THE CASE 3

Kennametal's Business 3
The Massachusetts Corporate Excise Tax 6
Proceedings Below 6

REASONS FOR GRANTING THE WRIT 11

I. The decision of the Massachusetts court conflicts with a previous decision of this Court on an important federal issue. 11

CONCLUSION 25

APPENDIX:

FINDINGS OF FACT AND REPORT, COMMONWEALTH OF MASSACHUSETTS APPELLATE TAX BOARD (Nov. 1, 1996) 2a

OPINION, SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS (Oct. 29, 1997) 24a

15 U.S.C. § 381 (1994) - (PUBLIC LAW 86-272) 37a

MASSACHUSETTS GENERAL LAWS, CHAPTER 63, SECTION 39 ..... 40a

TABLE OF AUTHORITIES

Cases — Page

FEDERAL CASES

Heublein, Inc. v. S. Carolina Tax Commission, 409 U.S. 275 (1972) 12, 13

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 12

Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992) ..... 2, passim

STATE CASES

Brown-Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So.2d 70 (1958), *appeal dism'd*, 359 U.S. 28 (1959) 12

Clairol, Inc. v. Kingsley, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dism'd*, 402 U.S. 902 (1971) 20

Gillette Co. v. State Tax Commission, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977) 23

Hervey v. AMF Beaird, Inc., 250 Ark. 147, 464 S.W.2d 557 (1971) 20

International Shoe Co. v. Fontenot, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959) 12

Kennametal v. Commissioner of Revenue,
426 Mass. 39, 686 N.E.2d 436 (1997) ..... 2, passim

Kennametal v. Commissioner of Revenue, 20 Mass.
App. Tax Bd. Rep. 6 (Nov. 1, 1996) (Michie),
aff'd 426 Mass. 39, 686 N.E.2d 436 (1997) ..... 2, passim

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 8, cl. 3 2

15 U.S.C. § 381 (Pub. L. 86-272) ..... 3, passim

28 U.S.C., § 1257(a) 2

28 U.S.C. § 2101(c) 2

STATE STATUTES

Mass. Gen. Laws ch. 63, § 39 6

Mass. Gen. Laws ch. 63, § 39(a) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. _____

KENNAMETAL, INC.,
Petitioner,

v.

COMMISSIONER OF REVENUE
FOR THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

**On Petition for Writ of Certiorari
To the Supreme Judicial Court of the
Commonwealth of Massachusetts**

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner, Kennametal, Inc. ("Kennametal"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts (the "Massachusetts court")

entered on October 29, 1997. The Massachusetts court decided a constitutional question contrary to this Court's specific standards set forth in *Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) (hereinafter referred to as "*Wrigley*").

OPINIONS BELOW

The opinion of the Massachusetts court is reported at 426 Mass. 39, 686 N.E.2d 436 (1997), and is reprinted in the Appendix at 24a

The opinion of the Appellate Tax Board for the Commonwealth of Massachusetts (the "board") is reported at 20 Mass. App. Tax Bd. Rep. 6 (Nov. 1, 1996) (Michie), and is reprinted in the Appendix at 2a.

JURISDICTION

The opinion of the Massachusetts court was rendered on October 29, 1997. No rehearing was requested. This Petition is filed within 90 days of the Massachusetts court's judgment as allowed by 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.1.

The jurisdiction of this Court to review the judgment of the Massachusetts court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Commerce Clause, art. 1, sec. 8, cl. 3, of the United States Constitution.

FEDERAL STATUTES INVOLVED

This case involves Public Law No. 86-272, codified at 15 U.S.C. § 381 (1994) (hereinafter referred to as Section 381).

The text of this statute and pertinent sections of the Massachusetts corporate excise tax statute are reported in the Appendix at 37a-42a.

STATEMENT OF THE CASE

Kennametal's Business

Kennametal is a multi-national corporation, organized under the laws of the Commonwealth of Pennsylvania and headquartered in that Commonwealth. Kennametal is engaged in the development, manufacture, and sale of cutting bits and related products for the manufacture of metals, alloys and plastics. Kennametal's product line consists of approximately 20,000 different types of carbide cutting bits and accessories.[1]

During the period in question, from 1975 to 1989, Kennametal conducted business in Massachusetts through the use of a direct field sales force. The sales force consisted primarily of what Kennametal called tooling system engineers ("TSEs") and service engineers ("SEs"). None of these so-

---

[1] Cutting bits are small inert pieces of material with no movable parts. Their life expectancy ranges from a few minutes to no more than a day, with an average life expectancy of eight (8) minutes.

called engineers were in fact licensed engineers or even college graduates. They were typically high school graduates with varying machine shop experience.

TSEs were experienced personnel responsible for maintaining customer accounts. TSEs regularly visited current and prospective customers to solicit orders, conduct presentations of new products, and to provide limited technical information regarding the specific application of various types of cutting bits. SEs were less experienced personnel who did not have responsibility for customer accounts and whose primary function was to assist TSEs.

Also during the period in question, Kennametal held no property in Massachusetts other than its sales catalogues, automobiles (which Kennametal leased for use by its sales force), and samples of cutting bits which the sales force supplied free of charge in connection with its customer visits.

Kennametal is engaged in a highly competitive industry and on balance its products are on the high end of the market. Thus, Kennametal's business requires a concerted sales effort. During the years in question, the Massachusetts direct field sales force of Kennametal engaged in a number of activities specifically designed to solicit orders of cutting bits in this highly competitive market.

At issue in this case is the nature of several activities engaged in by Kennametal's sales force, namely: (1) the use of cutting bit samples to allow Kennametal customers to

compare the performance of Kennametal's cutting bits[2] to competitors' bits, (2) the provision to customers of assistance and guidance, (so-called "technical advice") in selecting the proper cutting bit to purchase from the 20,000 different cutting bits and accessories offered for sale by Kennametal, (3) the identification of competitors' cutting bits being used by customers, in order to suggest alternative Kennametal cutting bits to purchase so as to "standardize" customers' product lines, (4) the provision of in-plant "training" presentations in which Kennametal introduced new products to the market or targeted various industries with a specialized line of Kennametal products, and (5) the assistance provided to dissatisfied customers in choosing different Kennametal products to purchase (so-called "technical advice"), so that those customers could achieve optimum results from Kennametal products.

---

[2] The testing of cutting bits was performed by customers and recorded by the Kennametal sales force. The results achieved from testing samples were provided to customers at no charge and were recorded on "Tool Performance Reports" to allow customers to compare the performance of Kennametal cutting bits to the performance of competitor cutting bits already in use by the customer. Kennametal cutting bits' life expectancies range from a few minutes to a day--with an average life expectancy of eight minutes. The Tool Performance Report was used to record both the length of time a Kennametal cutting bit lasted during a given application, and the length of time a competitor's cutting bit lasted during the same application.

The Massachusetts Corporate Excise Tax

The Commonwealth of Massachusetts levies a corporate excise tax on any foreign corporation that is "exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth . . ." Mass. Gen. Laws ch. 63, § 39 (West 1996).

The term "doing business" as used in the Massachusetts corporate excise tax statute "shall mean and include each and every act, power, right, privilege or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property." Mass. Gen. Laws ch. 63, § 39(a) (West 1996).

Proceedings Below

In 1963, Kennametal received a ruling from the Massachusetts Commissioner of Revenue (the "Commissioner") that Kennametal's activities in the Commonwealth at that time did not subject Kennametal to the corporate excise tax. Accordingly, Kennametal stopped filing tax returns in Massachusetts subsequent to 1963.

In March of 1984, the Commissioner issued a letter ruling holding that the use of company cars within the Commonwealth by employees of a foreign corporation exceeded the protection afforded by Section 381(a)(1) thereby subjecting the corporation to the Massachusetts corporate

excise tax. *See* LR 84-1, revoked by LR 88-7, 3 Mass. Tax Guide at 567, 615 (West 1997). Consequently, Kennametal resumed filing Massachusetts corporate excise tax returns for its 1985 and subsequent tax years. In 1987, the Commissioner commenced an audit of Kennametal that resulted in the assessment of additional taxes and penalties for the tax years 1976 through 1984. During this period, the Commissioner rescinded his letter ruling, and held that the use of company cars within Massachusetts by employees of a foreign corporation did not subject that corporation to the Massachusetts corporate excise tax. *See* DOR Directive 88-8, 3 Mass. Tax Guide at 486 (West 1997). Kennametal timely filed requests for abatement of tax for all relevant tax years. The Commissioner abated penalties for tax years 1976 through 1985, but denied the remainder of the abatement requests.

Kennametal appealed to the board which, by its decision dated November 1, 1996 (the "board's Decision"), affirmed the Commissioner's determination. The board found that Kennametal's activities within Massachusetts during the periods at issue exceeded the "solicitation of orders" of tangible personal property and were not otherwise ancillary to the solicitation of orders, or *de minimis*, and therefore did not fall within the immunity from taxation afforded by Section 381(a)(1). Specifically, the board found that Kennametal:

> [U]ndertook a number of programs to demonstrate to their customers why their products were superior. . . .These programs were not only limited to new customers, but would also be performed on behalf of existing

> customers, in an attempt to maximize customer satisfaction and to potentially expand Kennametal's market share. For example, Kennametal had their field personnel conduct tooling-product-application studies, called "Tooling Performance Reports," on behalf of their customers, to demonstrate to their customers the superiority of Kennametal products.

20 Mass. App. Tax Bd. Rep 6, 8 (Nov. 1, 1996) (Michie).

The board also found that addressing customer complaints concerning poor performance of Kennametal cutting bits by asking what speed or feed the machine was being run at to ensure that the cutting bit was being used properly (or by suggesting the purchase of new or superior cutting bits to perform the application) went beyond the protection of Section 381. The board stated:

> Although Kennametal did not make physical repairs after the sale, by providing technical assistance as to the proper application of the product after the sale, and completing tool performance reports and tool standardization programs in which Kennametal employees suggested operational and/or product changes, Kennametal's activities are akin to post sale "repairs."

Id. at 14.

The board found that Kennametal sales personnel, in suggesting new and improved products to purchase, providing samples to test Kennametal products against competitors' cutting bits in use by the customer and reducing the results of these performance tests to a simple report to justify the purchase of Kennametal cutting bits over those of competitors, went beyond the protection of Section 381. The board stated:

> Although Kennametal's activities may have had the effect of helping to enhance future sales and ultimately increase its market share, they were not *entirely ancillary* to the solicitation of orders. The activities obviously ingratiated the salesmen, but quite clearly had an "independent business function."

Id. at 16 (emphasis in original).

Kennametal timely filed a Notice of Appeal with the board on November 6, 1996. The appeal was perfected by filing an Entry of Appeal with the Massachusetts Appeals Court on December 2, 1996 and the case was entered on the court's docket on December 2, 1996. On March 14, 1997, the Commissioner through the Commonwealth's Attorney General's Office filed an Application for Direct Appellate Review with the assent of Kennametal, to the Massachusetts court. The Motion was allowed on April 17, 1997, and after oral argument, the court issued its decision affirming the decision of the board on October 29, 1997.

The Massachusetts court held that the board's Decision was supported by substantial evidence, and stated:

> There exists no bright line to distinguish those activities that are entirely ancillary to the solicitation of orders from those that also serve an independent function. Activities such as those cited by the board occur along a continuum. *Wrigley* guides our analysis merely with examples at each end of the continuum. In the end, business activities conducted within a state must be considered on an individual basis.

Kennametal v. Commissioner of Revenue, 426 Mass. 39, 45, 686 N.E.2d 436, 441 (1997).

The Massachusetts court further held that:

> The activities here in question were designed not only to solicit orders, but to ingratiate customers and to assist buyers in knowing what to order. Those activities fall outside of the protection afforded by Section 381(a)(1). Under *Wrigley*, the activities must facilitate the actual solicitation of orders; they may not merely serve to increase general sales.

Kennametal, 686 N.E.2d at 441 (1997).

Lastly, the Massachusetts court held that:

> Kennametal had reasons independent of soliciting orders that motivated it to provide the activities in question, even if no sales force operated in the Commonwealth. For example, proper use of

> Kennametal's products improves performance and enhances the company's reputation among buyers. This can be especially important for companies such as Kennametal that attempt to promote their products as being of higher quality than those of competitors.

Id.

REASONS FOR GRANTING THE WRIT

I. The decision of the Massachusetts court conflicts with a previous decision of this Court on an important federal issue.

The decision of the Massachusetts court conflicts with this Court's decision in *Wrigley* with respect to the following important federal question: what constitutes "solicitation" of orders of tangible personal property and "activities ancillary thereto" under Section 381(a)(1)?

In *Wrigley*, this Court articulated a precise set of rules governing the application and scope of Section 381(a)(1), and provided a detailed analysis of the types of sales activities which are protected under the federal statute. The Massachusetts court misapplied this analysis in reaching a decision that is contrary to the letter and the spirit of this Court's decision in *Wrigley*.

In 1959, Congress enacted Public Law 86-272 (codified at 15 U.S.C. § 381) in response to the concerns of the business

community that this Court had signaled[3] a conclusion that the individual states had extremely broad authority to impose corporate excise taxes on foreign corporations whose only contacts with a state consisted of sending salesmen into that state. *See* H.R. Rep. No. 936, 8th Cong., 1st Sess., 2 (1959). *See also Heublein, Inc. v. S. Carolina Tax Commission*, 409 U.S. 275, 280 n.5 (1972). This federal statutory provision expressly restricts the authority of a state to impose an income tax on a foreign corporation whose business within the state consists solely of "the *solicitation of orders* . . . for sales of tangible personal property, which orders are [then] sent outside the state for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the state." 15 U.S.C. § 381(a)(1) (emphasis added). More than thirty (30) years after the enactment of this provision, this Court in *Wrigley* set forth working definitions of the law's operative terms.

Specifically, this Court held that the phrase "solicitation of orders," as found in Section 381(a)(1), includes "more than what is strictly essential to making requests for purchases." *Wrigley*, 505 U.S. at 228 (1992). The phrase also includes those activities which are "entirely ancillary to requests for purchases." *Id.* This Court further explained

---

[3] The concerns of the business community stemmed from this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and this Court's dismissal of an appeal in *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), *appeal dism'd*, 359 U.S. 28 (1959) and this Court's denial of certiorari in *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959).

that activities are "entirely ancillary to requests for purchases" if they "serve no independent business function apart from their connection to the soliciting of orders." *Id.* at 228-29.

On the other hand, activities are *not* entirely ancillary to requests for purchases if they are "activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Id.* at 229. The determination of whether an activity is entirely ancillary to requests for purchases is made by considering the facts and circumstances of each case. *See id.* at 234-35.

Thus, under this Court's analysis, in considering the nature of non-direct solicitation activities (those activities which are not strictly essential to making requests for purchases), such activities will *not* be "ancillary to requests for purchases" only if the company would have reason to engage in such activities even if the company did not already have a direct sales force available in the state.

Importantly, in determining what Congress meant by the term "solicitation of orders" this Court rejected the recommendation by the State of Wisconsin that the term must be construed narrowly. *Id.* at 224. Rather, on the grounds that Section 381(a)(1) was intended by Congress specifically to restrict state taxing authority, this Court concluded that it could not be construed narrowly. *Id.*

Instead, this Court noted that Section 381(a)(1) uses the term "solicitation" in a general sense that includes not merely the ultimate act of inviting an order but the entire process associated with the invitation. *Id.* at 225. The Court also noted that Section 381(a)(1) describes "the solicitation of

orders" as a subcategory, not of in-state acts, but rather of in-state "business activities," a term that "more naturally connotes *courses of conduct*." *Id.* at 225-26

This Court stated:

> We think it evident that in this statute the term includes, not just explicit verbal requests for orders, *but also any speech or conduct that implicitly or explicitly invites an order*. Thus, for example, a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in "solicitation" even if he does not come right out and ask the retailer to buy some.

Id. at 223 (emphasis added).

This Court further noted that limiting Section 381(a)(1)'s phrase "solicitation of orders" only to those acts that are "'essential' for making requests [for purchases] would engender endless uncertainty, contrary to the whole purpose of the statute." *Id.* at 226. Accordingly, this Court drew the bright line between those activities "that are *entirely ancillary* to requests for purchases" and those activities that "the company would have reason to engage in anyway" but instead elects to allocate to its in-state sales force. *Id.* at 228-29 (emphasis added). Under this Court's clear test, a taxpayer may avail itself of Section 381(a)(1)'s protection by establishing that the activities engaged in by its salesmen "serve no independent business function apart from their connection to the soliciting of orders." *Id.* In applying this test to the actual facts in *Wrigley*, this Court stated:

> Providing a car and a stock of free samples to salesmen is part of the "solicitation of orders," because the only reason to do it is to facilitate requests for purchases. Contrariwise, employing salesmen to *repair or service* the company's products is not part of the "solicitation or orders," since there is a good reason to get that done whether or not the company has a sales force.

Id. at 229 (emphasis added).

As part of its analysis, this Court expressly rejected the argument that had been used by a number of state courts that post-sale activities could not be included within the phrase "solicitation of orders." *Id.* at 230. This Court stated:

> [T]he pre-sale/post-sale distinction is hopelessly unworkable. Even if one disregards the confusion that may exist concerning when a sale takes place . . . manufacturers and distributors ordinarily have ongoing relationships that involve continuous sales, making it often impossible to determine whether a particular incidental activity was related to the sale that preceded it or the sale that followed it.

Id. at 230-31 (citation omitted).

Applying this expanded definition of Section 381(a)(1)'s phrase "solicitation of orders" to the facts of *Wrigley*, this Court concluded that the replacement of stale

gum by the taxpayer's salesmen, the use of agency stock checks to provide gum, and the storage of gum in-state by company salesmen for these purposes constituted activities that had an "independent business function" and thus exceeded the "solicitation of orders." *Id.* at 233. Although acknowledging implicitly that each of these activities had a role in facilitating sales by establishing a positive relationship with the taxpayer's customers, the Court concluded that they would have had to have been performed by the taxpayer whether or not the company had a direct field sales force. *Id.* at 233-34. The other activities engaged in by the salesmen, consisting of in-state recruitment, training and evaluation of personnel and the use of hotels and homes for meetings were held by this Court to be ancillary to the "solicitation of orders". *Id.* at 234-35. Similarly, this Court concluded that the intervention by the taxpayer's regional sales manager on behalf of customers with respect to credit issues with Wrigley's headquarters was ancillary to the "solicitation of orders," stating that: "[i]t hardly appears likely that this mediating function . . . would have been performed by some other employee–some company ombudsman, so to speak–if the on-location sales staff did not exist." *Id.* at 235. In this regard, this Court specifically held that since the purpose of this particular activity was to "*ingratiate the salesman with the customer,*" it could be said that it appropriately facilitated the request for a purchase. *Id.* (emphasis added).

The Massachusetts court purported to follow this Court's standards as set forth in *Wrigley*. However, it is apparent from a close reading of the Massachusetts court's decision that the Massachusetts court, in effect, rejected the standards set forth in *Wrigley* for determining which activities

are immune from taxation under Section 381(a)(1) – in favor of its own more restrictive standards.

In the first instance, the Massachusetts court does not acknowledge the breadth of the rule of *Wrigley*. The Massachusetts court states:

> There exists no bright line to distinguish those activities that are entirely ancillary to the solicitation of orders from those that also serve an independent business function. Activities such as those cited by the board occur along a continuum. *Wrigley* guides our analysis merely with examples at each end of that continuum. In the end, business activities conducted within a state must be considered on an individual basis.

Kennametal, 686 N.E.2d at 441 (1997).

The Massachusetts court's assumption that immune and non-immune activities occur along a continuum suggests that marginal changes in the way a company does business may transform an otherwise immune activity into a non-immune activity – a standard that invariably will punish an aggressive sales force and reward complacency. The Massachusetts court's articulation is certainly not the test of *Wrigley*. This Court in describing the proper standard to be used stated:

> Once it is acknowledged, as we have concluded it must be, that "solicitation of orders" covers more than what is strictly essential to making

> requests for purchases, the next (and perhaps the only other) clear line is the one between those activities that are entirely ancillary to requests for purchases – those that serve no independent business function apart from their connection to the soliciting of orders – and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force.[4]

Wrigley, 505 U.S. at 228-29 (1992).

In applying its own standard, the Massachusetts court incorrectly concludes that:

> The activities here in question were designed not only to solicit orders, but to *ingratiate customers and to assist buyers in knowing what to order*. Those activities fall outside of the protection afforded by Pub. L. 86-272. Under *Wrigley*, the activities must facilitate the actual solicitation of orders; they may not merely serve to increase general sales.

---

[4] Rather than a gradual ascent into non-immune activities this Court's "independent business function" test is more like a cliff– once having stepped off, taxation is a given subject only to a *de minimis* safety net. As this Court has warned, except for the *de minimis* exception, Section 381 operates "in . . . stark, all-or-nothing fashion: A company either has complete net-income tax immunity or it has none at all, even for its solicitation activities." *Wrigley*, 505 U.S. at 231 (1992).

Kennametal, 686 N.E.2d at 441 (1997) (emphasis added).

The Massachusetts court's specific conclusion here is wrong for a number of reasons.[5] First, the Massachusetts court seemingly rejects *Wrigley's* "independent business function" test in favor of a "direct-indirect sales pitch" test. This Court informs us in *Wrigley* that indirect solicitation activities are protected as long as they serve no independent business function. Moreover, this Court has held that activities designed to "ingratiate the salesmen with the customer" may be protected. *Wrigley*, 505 U.S. at 235 (1992). In *Wrigley*, this Court in evaluating the activities of regional sales managers intervening in "rather nasty" credit disputes involving important accounts in order to "get the account and [Wrigley's] credit department communicating" stated:

> It hardly appears likely that the mediating function between a customer and a central office would have been performed by some other employee – some company ombudsman, so to speak – if the on-location sales staff did not exist. The purpose of the activity, in other words, *was to ingratiate the salesmen with the customer, thereby facilitating requests for purchases.*

---

[5] To the extent *Wrigley* can be read as failing to address the assumed category of activities outside the trilogy of activities encompassing (1) "solicitation", (2) "activities ancillary" thereto, or (3) having an "independent business function", such activities must be determined to be immune from taxation lest the purpose of Section 381 be frustrated.

Id. at 235. (emphasis added.)

Thus, contrary to the holding of the Massachusetts court, activities that are intended to ingratiate the sales force with customers in order to facilitate future requests for purchases are protected, as long as those activities do not have an independent business purpose – that is, if the company would not have reason to engage in such activities anyway if there was no in-state sales force.[6]

The Massachusetts court's statement that activities designed to "assist buyers in knowing what to order" exceed the protection afforded by Section 381(a)(1) is equally incorrect. It is hard to imagine any activity, other than an actual request for a purchase, that reflects the essence of solicitation more than assisting buyers in knowing what to order. As this Court has stated:

---

[6] The Massachusetts court would apparently limit the scope of "solicitation" to "asking" for, "enticing" to, or "to approach with a request or plea," *see Wrigley*, 505 U.S. at 223 (1992), contrary to this Court's admonition that the term in the context of Section 381(a)(1) includes not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order. *Id.* The Massachusetts court would thus modify this Court's decision in *Wrigley* and return to the narrow construction of Section 381(a)(1) espoused by some states prior to the issuance of the *Wrigley* decision. *See generally Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971); *Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, aff'd, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dism'd*, 402 U.S. 902 (1971).

> That the statutory phrase uses the term "solicitation" in a more general sense that includes not merely the ultimate act of inviting an order but the entire process associated with the invitation is suggested by the fact that § 381 describes "the solicitation of orders" as a subcategory, not of in-state acts, but that of in-state 'business activities' – a term that more naturally connotes courses of conduct.

Wrigley, 505 U.S. at 225-26 (1992).

Clearly, activities designed to "assist buyers in knowing what to order," *Kennametal*, 686 N.E.2d at 441 (1997), are within the "courses of conduct," *Wrigley*, 505 U.S. at 226 (1992), constituting the entire process of inviting an order. Accordingly, the Massachusetts court's reasoning is contrary to the rule of *Wrigley*.

In addition, the Massachusetts court's conclusion that because "the proper use of Kennametal's products improves performance and enhances the company's reputation among buyers," *Kennametal*, 686 N.E.2d at 441 (1997), that assisting these same buyers in choosing the proper cutting bit to purchase for a particular application (out of literally thousands of Kennametal cutting bits) exceeds solicitation is likewise contrary to the spirit of *Wrigley*.[7] Clearly, it is in the

---

[7] This Court rejected the "routinely-associated-with-solicitation" or "customarily-performed-by-salesmen" approach proffered by the taxpayer in *Wrigley* on the basis that such an approach would

(continued...)

best interest of sales people to sell the proper item to customers, in order to ensure future orders. The purchase of the correct Kennametal cutting bit for a particular application ensures that a particular customer will be satisfied with the product, and will continue to order cutting bits from Kennametal. This is exactly the type of "ongoing relationship," that this Court recognizes as commonplace between manufacturers and distributors. *Wrigley*, 505 U.S. at

---

[7] (...continued)
convert a standard embracing only a particular activity ("solicitation") into a standard embracing all activities routinely conducted by those who engage in that particular activity ("salesmen"). *Wrigley*, 505 U.S. at 227 (1992). This Court warned that if such an approach were to be applied "on an industry-by-industry basis, it would render the limitation of §381(a) toothless, permitting 'solicitation of orders' to be whatever a particular industry wants its salesmen to do." *Id.* Importantly, however, this Court never stated that solicitation and acts ancillary thereto were identical from industry to industry. Rather, this Court set forth an evidentiary test (the "independent business function" test) to determine whether or not activities in a particular industry exceed permitted solicitation. It would be anomalous to require each industry to limit its solicitation activities to a universal course of conduct. Clearly what constitutes "solicitation" may vary greatly from industry to industry. However, so long as that solicitation activity serves no independent business function, it should be protected under *Wrigley*. Therefore, assisting customers in choosing a particular cutting bit from a product line of 20,000 cutting bits would seem to be completely ancillary to solicitation in Kennametal's industry, even though in another industry, say the chewing gum industry, it would be highly improbable that a customer would need the assistance of a salesperson to choose the correct flavor from a limited number of choices.

230-31 (1992). The Massachusetts rule would result in salespersons in a complex and technical industry frequently selling the wrong product for a particular purpose, thereby ensuring the customer's dissatisfaction and threatening an otherwise symbiotic relationship. This cannot be the correct result under *Wrigley*.

Lastly, the Massachusetts court would deny immunity from taxation for activities "primarily intended, generally, to increase sales rather than directly to facilitate the solicitation of orders." *Kennametal*, 686 N.E.2d at 442 (1997). Again, the Massachusetts rule is directly contrary to the rule of *Wrigley*. For instance, it has long been recognized that so-called "missionary" activities are protected – in situations where an in-state sales force directly targets retailers in order to create goodwill and a market for its products, the fact that it is a wholesaler that ultimately places the order and not the retailer, does not affect the immune nature of the solicitation activities. *Wrigley*, 505 U.S. at 233-34 (1992). Specifically, this Court has recognized that:

> Section 381(a)(2) shields the manufacturers "missionary" request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order's being filled by a § 381 "customer" of the manufacturer, i.e., by the wholesaler who fills the orders of the retailer with goods shipped to the wholesaler from out of state.

Id. See also Gillette Co. v. State Tax Comm'n, 56 A.D.2d 475, 482, 393 N.Y.S.2d 186, 191 (1977) ("Advice to retailers on the art of displaying goods to the public can hardly be more

thoroughly solicitation. . ."). Thus, activities that are designed to "increase sales generally" are not necessarily non-immune. The proper test is not whether an activity facilitates sales generally, but rather, whether the activity either "facilitate[s] the *requesting of sales*," *Wrigley*, 505 U.S. at 233 (1992) (emphasis added), or has some other independent business function.

In the present case, the alleged non-immune activity – Kennametal's Massachusetts sales force helping Kennametal customers choose the right cutting bits to order – was specifically intended to "facilitate the requesting of sales" within the meaning of *Wrigley*. The same can be said of Kennametal's sales force's use of cutting bit samples to demonstrate the superiority of Kennametal products, Kennametal's standardization program designed to shift its customers' use of competitors' bits to Kennemetal's bits, Kennametal's in plant "training" presentations intended to introduce new products to be sold, and assisting dissatisfied Kennametal customers in choosing new cutting bits. Each of these activities were specifically intended by Kennametal to facilitate the requesting of sales, and served no other independent business purpose. *Wrigley*, 505 U.S. at 233 (1992).

CONCLUSION

The decision of the Massachusetts court, in deciding an important federal question under the Commerce Clause of the United States Constitution, conflicts with this Court's decision in *Wrigley*, and will create confusion for other state and federal courts interpreting *Wrigley* in the future. The Petition for a Writ of Certiorari should be granted to bring clarity and uniformity to the law of "solicitation" and "activities ancillary thereto."

Respectfully submitted,

WILLIAM E. HALMKIN
(Counsel of Record)
ARTHUR A. HUNDHAUSEN
ROBERT M. FINKEL
Attorneys for Petitioner
Hutchins, Wheeler & Dittmar
A Professional Corporation
101 Federal Street
Boston, Massachusetts 02110
(617) 951-6600

January 26, 1998